Appendix A

Amended Complaint.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINNESS, LOUIS H. MEYERS, FRANK PARRELLA, ROCCO P. PARRELLA, ALFRED P. PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STACI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Plaintiffs,

against

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Defendants.

Plaintiffs, by Warner & Birdsall, their attorneys, complaining of the defendants, respectfully allege:

FIRST: That at all times hereinafter mentioned, the Newspaper and Mail Deliverers' Union of New York and

Vicinity, hereinafter called the Union, was and still is an association of more than seven members and is unaffiliated with any international of other union, and the abovenamed Joseph Simons is, at the time of the commencement of this action, the President thereof.

SECOND: That defendant Union at all times hereinafter mentioned was and now is a labor union, composed of newspaper and mail deliverers employed within the City of New York and vicinity.

THIRD: Upon information and belief, that defendant News Syndicate Co., Inc., hereinafter called the Corporation, is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in the County of New York, State of New York.

FOURTH: That on and prior to October 25, 1948, and at all times hereinafter mentioned in this complaint, the defendant Union was the representative designated or selected for the purpose of collective bargaining by the majority of the employees of the defendant News Syndicate Co., Inc. and, as such, was the exclusive representative of all the employees of said defendant Corporation.

FIFTH: On October 25, 1948, the defendant Union, as such collective bargaining representative, and defendant Corporation entered into an agreement which, by its terms, was and still is effective and in full force and effect.

SIXTH: In and by said agreement, it was provided, in Section "2-L", in part, as follows:

> "The employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees other than half-day boys employed after the effective date of this agreement be required to become

members of the Union thirty days following the beginning of employment."

In and by said agreement it was provided, in Section "2-L", in part, as follows:

> "The Union offers to furnish at all times and at regular time rates as many men as may be required by a Publisher, such men to be competent and able to perform the particular operation for which they are required."

SEVENTH: The plaintiffs are all employed by the defendant Corporation as chauffeurs, distributors, route men, tiers, floor men, wrapper writers and relay men in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise.

EIGHTH: Each of the plaintiffs has been employed in the aforesaid capacity by the aforesaid Corporation for the following periods of time, respectively:

Name	*Employed by defendant Corporation since:*
Thomas Ryan	September, 1946
Louis Aiges	December, 1947
Leon Altheim	February, 1947
Hyman Bassin	June, 1947
David Berger	December 26, 1947
Joseph W. Bianca	March, 1947
Edward F. Brennan	September, 1946
Salvatore Cirigliano	July, 1946
Carmelo Coscia	June, 1948
Abe Friedman	September 28, 1948
Emanuel Goldberg	January, 1948

Name	*Employed by defendant Corporation since:*
Louis S. Goldkranz	November, 1947
Abraham I. Gordon	October, 1948
Anthony Guerriero	March 8, 1948
Joseph Haugh	February, 1947
Walter Heller	October, 1948
Louis Hochberg	October, 1945
John T. Holcomb	March, 1948
John Jones	April, 1948
Peter A. Kelly	October, 1945
Daniel Kenny	March, 1947
William Kleinman	March, 1947
Neil Knowles	November, 1947
John R. McGuinness	September, 1946
Louis H. Meyers	January, 1948
Frank P. Parrella	February, 1946
Rocco N. Parrella	January, 1948
Alfred P. Petrassi	February, 1947
Benjamin Ricotta	January, 1947
Harvey Rose	January 30, 1948
Aaron Sacks	February, 1947
Henry Sadowitz	October, 1948
Michael Scudero	January, 1947
Jack Sender	September, 1945
Irwin L. Siegel	September, 1947
John W. Smith	October, 1945
Nicholas Staci	October, 1945
Arthur Sternberg	April, 1948

Name	*Corporation since: Employed by defendant*
David Stupnick	October, 1947
Manny Hirschbein	November, 1947
Anthony F. Chiccoli	December, 1948
Benjamin Gordon	September, 1948
Donald Mallozzi	March, 1947—June, 1948 February, 1949
Jack Miller	February, 1949
Carl J. Ericsson	October, 1948

NINTH: All of the plaintiffs are qualified to perform the duties which they are presently performing for defendant Corporation.

TENTH: More than thirty days have elapsed since the effective date of the aforesaid agreement between the defendant Union and defendant Corporation, but none of the plaintiffs are members of the defendant Union, and said Union has refused to admit any of the plaintiffs into membership, although all of the plaintiffs are now and have been since October 25, 1948, and prior thereto, ready and anxious to join such Union immediately, and ready and anxious to comply with all the prerequisites for becoming members of said Union.

ELEVENTH: Defendant Union is what is known as a closed union and will not admit any one to membership except the four following classes of persons: (a) one legitimate son of a deceased member; (b) one son of a member who has been in good standing for 20 years; (c) persons designated by the defendant Union to do organization work; and (d) certain persons who have been arbitrarily selected by the Executive Board and general membership of the Union to be admitted into the Union for the purpose

of creating the impression that the membership is open to persons other than sons of members; but, upon information and belief, not more than 1% of all the members taken in by the Union during the past five years are included in this last category.

TWELFTH: None of the plaintiffs comes within any of the categories listed in paragraph "8" above except plaintiffs Steinberg, Siegel, Rose and Kenny; Steinberg being a son of a deceased member, and Siegel, Rose and Kenny being sons of members for twenty years; but Steinberg and Rose have been rejected by the Union because they are not the oldest sons; Kenny has been rejected by the Union because his father's twenty years service was not continuous; Siegel has been rejected by the Union because of a question concerning his father's length of service.

THIRTEENTH: That plaintiffs cannot join and become members of the defendant Union for the reason that the books of defendant Union are closed and have been closed for more than 10 years last past except to the classes of persons set forth in paragraph "Eleventh" above.

FOURTEENTH: Although, under the laws of the State of New York and of the United States, defendant Union was the exclusive representative of all the employees of defendant Corporation, defendant Union did not fairly represent certain of the employees, including these plaintiffs, in negotiating and entering into the contract referred to in paragraph "Fifth" above.

FIFTEENTH: That the defendant Union breached its obligation as exclusive bargaining agent of all of the employees of defendant Corporation (including these plaintiffs) by providing in said agreement that the employer would employ only members of the Union 30 days following the effective date of the aforesaid agreement, and by

offering to furnish at all times, as many men as might be required by defendant Corporation, although defendant Union then and at all times to the present day has arbitrarily and unlawfully excluded plaintiffs and all other non-union employees of defendant Corporation from membership in said Union.

SIXTEENTH: That the conduct of the defendant Union, in violating its obligation to the plaintiffs in failing to represent them fairly in bargaining with defendant Corporation and in providing for a union shop while arbitrarily and unlawfully excluding the plaintiffs from membership in its Union, is contrary to the public policy of the State of New York.

SEVENTEENTH: That plaintiffs have at all times satisfactorily and properly performed their duties as employees of defendant Corporation, but defendant Union has threatened to cause the discharge of and defendant Corporation, has threatened to discharge the plaintiffs from their positions aforesaid on the sole ground that plaintiffs are not members of defendant Union.

EIGHTEENTH: That plaintiffs are entirely dependent for the support of themselves and their families on obtaining work in the positions which they now hold with defendant Corporation. Practically all of the jobs of the type described in paragraph "Seventh" are controlled by the defendant Union under contracts containing clauses similar to those contained in paragraph "Sixth" above, and, as a result thereof, the defendant Union has a monopoly on all of the jobs of that type in New York City and vicinity, the area in which all of the plaintiffs live and work.

NINETEENTH: By reason of the failure of defendant Union to bargain fairly on behalf of all the employees of defendant Corporation, and by reason of the arbitrary and

unlawful exclusion of plaintiffs from membership in defendant Union and by reason of the threat of defendant Union to cause the discharge of and of defendant Corporation to discharge the plaintiffs, the plaintiffs are threatened with irreparable damage, including the deprivation of their civil rights guaranteed to them under the laws and Constitution of the State of New York and the United States.

TWENTIETH: That plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs ask judgment herein: (1) temporarily and permanently enjoining and restraining the defendant Corporation from threatening to discharge and from discharging these plaintiffs upon the ground that they are not members of defendant Union or upon the ground that they are required to replace them with members of defendant Union or upon the ground that members of the Union have been employed by defendant Corporation so that no vacancies exist for these plaintiffs; (2) permanently and temporarily restraining the defendant Union from interfering with the employment of these plaintiffs by the defendant Corporation or from attempting to secure the dismissal of these plaintiffs by defendant Corporation or from sending some of its members to the defendant Corporation for the purpose of having them hired by defendant Corporation thus causing the defendant Corporation to discharge the plaintiffs, (3) ordering and directing the defendant Union either to (a) admit the plaintiffs to full membership of the Union upon their agreement to conform to the Union rules and regulations and to pay the required initiation fees and dues, or (b) waiving the aforesaid union shop agreement with defendant Corporation in favor of a union which would admit plaintiffs into full membership; and (4) granting to the plaintiffs such other further and different relief as to the Court may seem just and proper

in the premises, together with the costs, and disbursements of this action.

WARNER & BIRDSALL,
Attorneys for Plaintiffs,
Office & P. O. Address,
165 West 46th Street,
Borough of Manhattan,
City of New York 19.

(Verified by plaintiffs Hirschbein, Chiccoli, B. Gordon, Mallozzi, Miller and Ericsson on January 25, 1950.)

Appendix B

Answer of Respondent Union.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Defendant Newspaper and Mail Deliverers Union of New York and Vicinity, by Samuel Duker, its attorney, answering the complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs thereof numbered "Third", "Seventh", "Eighth", "Ninth", "Twelfth", "Eighteenth".

2. Denies each and every allegation contained in paragraphs thereof numbered "Eleventh", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth", "Nineteenth" and "Twentieth".

3. Admits that more than thirty days have elapsed since the date of the agreement and admits that none of the

plaintiffs are members of the Union and except as so admitted, denies each and every allegation contained in paragraph "Tenth" thereof.

AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE, ALLEGES:

4. That at all times mentioned in the complaint the defendant News Syndicate Co., Inc. was and still is engaged in the publication of a newspaper known as the Daily and Sunday News which is circulated widely in the City and State of New York and in other states than New York and whose business is such as to make it a corporation operating in interstate commerce as that term is defined in the Labor Management Relations Act, 1947.

5. That, upon information and belief, the various acts complained of in the complaint herein constitute unfair labor practices on the part of the defendant herein, if committed as alleged, as such unfair labor practices are defined in said Labor Management Relations Act, 1947.

6. That, upon information and belief, sole and exclusive authority for the remedy of such unfair labor practices, as alleged, is by law vested in the National Labor Relations Board.

7. That by reason of the premises plaintiffs are not entitled to relief in this Court of Equity.

WHEREFORE, defendant demands judgment that the complaint herein be dismissed as against it, together with the costs and disbursements of this action.

SAMUEL DUKER,
Attorney for Newspaper and
Mail Deliverers Union,
120 West 42nd Street,
New York 18, N. Y.

(Corporation verification is on the back of the copy from which this copy was made.)

Appendix C

Answer of Respondent News.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

[SAME TITLE.]

Defendant, News Syndicate Co., Inc. by Townley, Updike & Carter, its attorneys, answering the complaint of plaintiffs herein,

1. Denies each and all of the allegations set forth in paragraphs Fourth, Seventh, Eighth, Sixteenth, Seventeenth, Nineteenth, and Twentieth of said complaint.

2. Denies each and all of the allegations set forth in paragraph Fifth of said complaint except the allegations that defendant Union and defendant corporation through its agent, Publishers' Association of New York City, entered into a collective bargaining agreement, effective October 25, 1948, which by its terms is still in full force and effect.

3. Denies each and all of the allegations set forth in paragraph Ninth of said complaint except the allegations that all of the plaintiffs at all the times mentioned in the complaint were qualified to perform the duties to which they have been assigned by defendant corporation on occasions when they were employed by said defendant.

4. Denies that it has knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs Tenth, Eleventh, Twelfth, Thirteenth, and Eighteenth of said complaint.

5. Denies that it has knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs Fourteenth and Fifteenth of said complaint except denies the allegations that defendant Union was the exclusive representative or bargaining agent of all the employees of defendant corporation.

WHEREFORE, defendant News Syndicate Co., Inc. demands judgment dismissing the complaint as to it, together with the costs and disbursements of this action.

TOWNLEY, UPDIKE & CARTER,
Attorneys for Defendant,
News Syndicate Co., Inc.,
Office & P. O. Address,
220 East 42nd Street,
Borough of Manhattan,
New York 17, N. Y.

(Verified by F. M. FLYNN, president, on February 6, 1950.)

Appendix D.

Opinion of Trial Justice.

SUPREME COURT,

QUEENS COUNTY,

SPECIAL TERM, PART III.

By HOOLEY, *J.* Dated: April 24, 1950

[SAME TITLE.]

APPEARANCES:

WARNER & BIRDSALL, Esqs., Attorneys for Plaintiffs, 165 West 46th Street, New York, New York, ARTHUR G. WARNER, Esq., JAMES E. BIRDSALL, Esq., of Counsel.

SAMUEL DUKER, Esq., Attorney for Defendant Newspaper and Mail Deliverers' Union, 11 West 42nd Street, New York, N. Y.

TOWNLEY, UPDIKE & CARTER, Esqs., Attorneys for Defendant News Syndicate Co. Inc., 220 East 42nd Street, New York, N. Y., J. HOWARD CARTER, Esq., JOHN S. BAINBRIDGE, Esq., of Counsel.

In this action some forty-five plaintiffs employed as chauffeurs, distributors and route men by the corporate defendant News Syndicate Co. Inc., hereinafter called the News, publisher of the Daily News and Sunday News, seek to restrain the said defendant News and the defendant Newspaper and Mail Deliverers Union, hereinafter called the Union, from threatening to discharge and from discharg-

ing plaintiffs or from interfering with the employment of the plaintiffs and ordering and directing the defendant Union either to (a) admit the plaintiffs to full membership in the Union, or (b) to waive the union shop agreement between the Union and the News in favor of a union which would admit plaintiffs into full membership. There was no proof of any actual discharge or even threat to discharge. There was considerable testimony offered, however, for the purpose of proving that the defendants interfered with the employment of plaintiffs illegally with resultant damage.

It appears that on and prior to October 25, 1948, the Union was the representative designated and selected for the purpose of collective bargaining by the majority of the employees of the defendant News in its delivery department, and as such was the exclusive representative of all of such employees of the defendant News.

On October 25, 1948, the defendant Union, as such collective bargaining agent, and the defendant News, together with other newspapers, entered into a written agreement, which provided in part as follows (Sec. 2L):

> "The employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees other than half day boys employed after the effective date of this agreement be required to become members of the Union thirty days following the beginning of employment."

In and by said agreement it was further provided (Sec. 2L) as follows:

> "The Union offers to furnish at all times and at regular time rates as many men as may be required by a Publisher, such men to be competent and able to perform the particular operation for which they are required."

If insufficient union men were available the News had the right under the agreement to employ non-union men.

More than thirty days have elapsed since the effective date of the agreement aforesaid, but none of the plaintiffs have become members of the defendant Union although they desire to become such members and have made efforts to join the Union, but the Union on its part has refused to admit any of the plaintiffs into membership. The proof shows that the defendant Union will not admit anyone to membership except the four following classes of persons: (a) one legitimate son of a deceased member, (b) one son of a member who has been in good standing for 20 years, (c) persons designated in the defendant Union to do organization work, and (d) certain persons who have been arbitrarily selected by the executive board and general membership of the Union. The plaintiffs claim that the Union is a closed union and that the classification under (d) supra is merely a device for the purpose of creating the impression that the membership is open to other than sons of members.

The complaint in this action follows substantially the complaint in the case of *Clark et al.* v. *Curtis* (273 App. Div. 797, aff'd 297 N. Y. 1014). In that case the sufficiency of the complaint was sustained. Implicit in the decision aforesaid is the determination that as a matter of law a union acting as exclusive bargaining agent of all of the employees of a corporation is bound to represent all of such employees fairly, and that any arbitrary conduct or discrimination on its part which shall deprive any of the employees, who are willing to join the union, of any rights accorded to the members of the union, gives a right of action to those against whom the discrimination is practiced. If in the *Clark* case, *supra,* the union as bargaining agent owed no duty to the non-union employees to represent them fairly, then the complaint would have been dismissed.

The court finds that the defendant Union did not fairly represent certain of the employees, including the plaintiffs, in negotiating and entering into the aforesaid con-

tract with the defendant News, and that said defendant Union breached its obligation as exclusive bargaining agent of such employees of the defendant News by providing in said agreement that the employer would employ only members of the Union 30 days following the effective date of the contract, and by offering to furnish at all times as many men as might be required by defendant corporation, although defendant Union then and at all times thereafter to the present time has arbitrarily excluded plaintiffs and all other non-union employees from membership in said Union.

The complaint herein is not based upon any statute but rather is based upon the common law principle that an agent is held to the highest good faith in his dealings with his principals and that if such agent acts adversely to the principal in any part of the transaction, he is guilty of fraud (*Beatty* v. *Guggenheim Exploration Co.*, 223 N. Y. 294, 304; *Murray* v. *Beard*, 102 N. Y. 505, 508). What the defendant Union did in negotiating the contract with the defendant News was to provide for what is known as a union shop. Such a shop, of course, is not illegal. What is illegal here is that the agent Union entered into a contract providing that these plaintiffs, whom it represented in part, and to whom it owed good faith, must be discharged for failure to join the very Union which negotiated the contract and which would not accept these plaintiffs as members.

The selection of the defendant Union as bargaining agent for such of the employees of the defendant News was a selection imposed upon these plaintiffs by operation of law as a result of a majority vote in an election.

In *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, an election was held to designate a bargaining representative between a C.I.O. union and an independent union. The independent union won a majority of the votes cast and was certified as the bargaining representative. The company then signed a closed shop agreement with the independent union which thereafter refused to admit to membership the C.I.O. employees. The latter were dis-

charged. The court reinstated with back pay the employees who had been discharged. The court said in part at page 255:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests, fairly and impartially."

To the same effect are the case of *Steele* v. *Louisville & Nashville R. R. Co.* (323 U. S. 192, 204; *Betts* v. *Easley,* 161 Kans. 459).

The protection granted by the common law and by the statutes, both state and federal, has been of inestimable value to the worker in enabling him to better his lot as to wages, hours of labor and working conditions. Under the beneficent protection of our laws, the unions have increased in strength and power and in the ability to protect the worker against unfair and sometimes selfish employers. But in the situation presented here, it is not a rapacious employer whose conduct is the subject of inquiry but a labor union which has a monopoly of the distribution of the great newspapers of the City of New York and which, wholly forgetful of the rights of the workers whom it is under obligation to protect, has arrogated to itself the right to interfere with the livelihood of forty-five employees and their families in the interests of perpetuating a hereditary class of newspaper deliverers under the principle of *primogeniture.* The attempt of the defendant Union to impose limitations on the right of other men to follow the calling of newspaper deliverers is repugnant to the common law, the labor statutes, state and federal, and the Constitution of the United States.

The attempt by the Union to maintain a union shop in which many non-union men are employed, at the same time

insisting on a closed union is a paradox. It is violative of the Constitutions both of the United States and the State of New York, in that it denies to the plaintiffs the equal protection of the law. The defendant Union seeks to deny to the plaintiffs freedom of the right to contract in favor of other persons whose only claim to a preference is derived from the accident of birth.

The attorney for the defendant Union calls the court's attention to the case of *Kelly* v. *Simons* (87 N. Y. S. 2d 767) which he contends sustains the position of the Union. In that case the Court said in part:

> "What would happen if the union should now attempt to interfere with the employment of the plaintiffs or do any acts tending to deny them any rights in connection with their employment enjoyed by union employees, is another matter. *Under the new union shop agreement the union could hardly insist upon non-union employees joining the union, and at the same time refuse them membership.*" (Italics supplied.)

That is precisely the case here. The Union did interfere with the employment of these plaintiffs and denied them rights which were enjoyed by the Union employees and the Union did require in the agreement which it negotiated in behalf of the plaintiffs that non-union persons such as these plaintiffs should join the Union, and yet at the same time refused to allow them to join the Union.

The action of the Union in refusing to allow the plaintiffs to become members thereof led to certain discriminatory practices by the defendants herein to the damage of plaintiffs.

Section 4 of the collective bargaining agreement between the defendants dealing with a seniority system, provided in substance that under Sec. 4-A the seniority of all employees was arranged on a shop seniority basis. First, all regular situation holders were given seniority and priority in accordance with their length of service with the News.

Next, all regular substitutes were listed according to the length of their service with the News. Next, so-called extras were listed in the order of their seniority and only after the lists of situation holders, substitutes and extras were exhausted, were any other classes of persons, including those employed in the delivery departments of other metropolitan newspapers, entitled to employment.

Section 4-B of the collective bargaining agreement provided that where a regular situation became vacant, it had to be filled, first, from among the regular situation holders, in accordance with their seniority standing, and then from among the substitutes, in accordance with their seniority standing. Section 4-G of the collective bargaining agreement defined a regular situation holder or regular substitute of the News as one receiving five days or five nights work in each calendar week for a period of five weeks. All of the plaintiffs came within this definition of regular substitute.

Prior to the commencement of this action, the hiring practice at the plants of the News in New York and Brooklyn was substantially as follows: At about 7 o'clock P. M. the substitutes reported for work. The names of the substitutes were then called, and they were assigned to the various positions which were open each night. The proof established that the names of the union men were called first, and thereafter the non-union men. Under this procedure, the names of union men were called ahead of non-union men with greater seniority. When the 7 o'clock positions were filled, the remaining substitutes would leave and report again at 12 o'clock, midnight. At that time the names of the substitutes were again called, and they were assigned to the positions remaining, but those whose names were not reached, did not work.

Under Sec. 4-B of the agreement, when openings existed among the regular situation holders, the vacancies were to be filled in the order of seniority. But in actual practice, the plaintiffs were passed over in favor of union members with less seniority.

On or about January 3, 1950 the Evening Sun, one of the great metropolitan papers, ceased to exist. Many of the union members employed by the Sun lost their positions and sought employment with the News. The effect of this on these plaintiffs became serious. Theretofore, the plaintiffs in the main had managed to average five nights work notwithstanding the preference granted to union members, which preference resulted in many of them having to attend seven nights per week to get five nights work, although union members were required to report only upon the nights they wished to work. But after January 3, 1950 the young sons of members, as before, continued to get preference by being admitted into the union, but now the former employees of the Sun who were union members received the same preference over the non-union men as is hereinbefore described. As a result there was a loss of work among the non-union employees, including these plaintiffs.

On January 16, 1950 this action was commenced. That night the News attempted to change the system by calling all men in their order of shop seniority, in accordance with Sec. 4-A of the bargaining agreement. The Union called a strike.

There was considerable argument upon the trial concerning industry seniority. But industry seniority is not permitted under the collective bargaining agreement. Sec. 4 thereof plainly states that employment shall be according to shop seniority. Sec. 4 gives a regular substitute a definite priority and seniority over extra men coming from other shops. It is true that the Adjustment Board made an interim award under date of May 23, 1949 to the effect that extra men should be hired on the basis of industry seniority. However, on June 30, 1947, said Adjustment Board handed down a final award which stated: "The following hiring practices shall be substituted for those temporarily in effect under the award of the Adjustment Board, dated May 23, 1949." A new schedule of hiring practices was set up under the final award which clearly superseded

that of May 23, 1949. The Union opposed the said final award and moved to vacate it. The Union claimed among other things that the contract provided a hiring preference for regular substitutes over extras; that such preference was set aside by the award and substitutes were hired from the same list as extras; that the contract provided for shop seniority; that the award set aside seniority and substituted therefor a complex system based on total earnings of each person in his own and in other shops with different point credits for the same amount of earnings in different years; that the contract gave regular situation holders and substitutes an unvarying seniority position on the basis of employment with one newspaper; that the award made the status of such person vary and change every three months in accordance with their earnings for three months prior in the newspaper publishing industry as a whole; that the contract gave extras seniority on the basis of their original employment with a newspaper; that the award set this aside and lists such persons on the basis of points earned throughout the industry.

Thereafter the Supreme Court vacated the award of June 30, 1947 (*Matter of Simons,* N. Y. L. J., November 4, 1949, Hecht, J.). The Court held in part:

> "* * * It seems clear to me that the arbitrators exceeded their powers in making the award of June 30. They were authorized to determine 'any question which may arise with respect to the qualifications or competency of employees or otherwise with respect to the interpretation or application of these provisions' governing seniority. Their award, however, rewrote the provisions of section 4 and devised a new method of hiring at variance therewith, * * *."

It is obvious that one of the methods of hiring condemned in the decision last cited was hiring on an industry wide basis rather than on the basis of shop seniority, as provided in the contract, which made the award illegal.

There is a dispute as to whether the interim award of May 23, 1947 survived the vacatur of the final award of June 30, 1947. Both defendants maintain such survival. It is clear to this court that when the award of June 30 came into existence, by its very terms it was substituted for the award of May 23, 1947, and that award went out of existence for all purposes and the vacating of the award of June 30, 1950 did not have the effect of reviving it.

In any event there is implicit in the decision of the court in the case last cited a determination that in no event could the Adjustment Board substitute industry seniority for shop seniority as specified in the plain language of the bargaining contract. It is immaterial whether the defendants did for a time substitute industry seniority for shop seniority after the interim and final awards aforesaid in the matter of hiring. Such action was clearly illegal being in conflict with the agreement.

This action does not involve a labor dispute within the meaning of Section 876-a of the Civil Practice Act. This contention was raised in all courts in *Clark* v. *Curtis, supra.* There is no dispute here as to wages, hours, working conditions or representation for collective bargaining (*Larose* v. *Possehl,* 156 Misc. 476). The controversy here involved relates to an alleged breach of trust, an alleged betrayal by the defendant Union of certain of the workers whose interests it was charged with protecting.

The contention of the defendants that if the plaintiffs have any remedy at all, it falls within the exclusive jurisdiction of the National Labor Relations Act, cannot be sustained. The case of *Clark* v. *Curtis, supra* is sufficient answer to that contention. The defendant Union urged upon the Court of Appeals in its brief in that case the effect of the Taft-Hartley Act (see also *Costaro* v. *Simons,* N. Y. Law Journal, Dec. 5, 1949, Supreme Court, Queens County, Colden, J.).

The plaintiffs are entitled to the injunctive relief sought, restraining the defendants, the News and the Union, from continuing the hiring practices heretofore followed and

herein condemned, restraining the defendant Union from interfering with the plaintiffs' employment. The plaintiffs are also entitled to judgment restraining the defendants from preventing the plaintiffs from enjoying the benefits to which they are entitled and from obtaining their rightful places in the shop seniority lists without regard to Union membership. The plaintiffs are also entitled to judgment restraining the defendants from giving preference to members of the Union, without regard to the principle of shop seniority and thus practicing discrimination.

With regard to the relief sought by plaintiffs seeking to compel the Union to admit these plaintiffs to membership therein, the court comes to a more difficult situation. It has been the law in this state for many years that a union cannot be compelled to admit strangers to membership (*McKane* v. *Adams,* 123 N. Y. 609; *Murphy* v. *Higgins,* 12 N. Y. S. 2d 913, aff'd 260 App. Div. 854; *Miller* v. *Ruehl,* 166 Misc. 479; *Acierno* v. *North Shore Bus Co. Inc.,* 173 Misc. 79, 81; *Shein* v. *Rose,* 12 N. Y. S. 2d 87). However, no case in which this principle of law was laid down bore the slightest resemblance to the case at bar.

At the risk of boring repetition, we must recall that here the Union acted as agent for the plaintiffs who were not members. As such agent, the Union provided in the bargaining agreement for a Union shop. The employer in said agreement was required to limit employment only to members of the Union, except where union men were not available. The hiring practices which were followed after the agreement gave preferences and privileges to the Union men not enjoyed by these plaintiffs.

This court conceives the following to be a principle of law:

> Where a union is designated as a bargaining agent on behalf of all the employees and accepts the principle of the Union shop and incorporates such principle into a contract which provides that all non-union men must join the union within 30 days, then such provisions of

the agreement relating to the union shop are illegal, invalid and void in a case such as this, where the union refuses to admit such non-union men to membership without just cause and discriminates against such employees because of such non-membership in the Union.

It is no answer to say that the action of the Union in denying membership to plaintiffs does not violate the Taft-Hartley Act. This action is not brought under that Act. There is present here a situation which has never been heretofore passed upon by the courts. It may be pointed out that these plaintiffs are not "strangers" to the union, that being the designation used in various decisions holding that the Union was not required to admit them. These plaintiffs are a part of the principals for whom the Union acts as agent and to whom the Union owes the duty of fair and honest dealing and against whom it may not discriminate in favor of the other principals who are members of the Union.

The plaintiffs are also entitled to judgment ordering and directing the defendant Union to admit the plaintiffs to full membership in the Union, except for just and legal cause, upon their agreement to conform to the Union rules and regulations and to pay the required initiation fees and dues, or in the alternative, restraining the defendants from conducting their activities and relations with these plaintiffs upon the basis of the principle of a union shop.

Settle judgment on notice.

(Signed) FRANCIS G. HOOLEY,
J. S. C.

Appendix E

Judgment of the Trial Court.

At a Special Term, Part III, of the Supreme Court, held in and for the County of Queens, at the County Courthouse, 88-11 Sutphin Blvd., Jamaica, New York, on the 10th day of May, 1950.

Present: Hon. Francis G. Hooley, *Justice.*

[Same Title.]

This action having duly come on for trial before Mr. Justice Francis G. Hooley, at a Special Term, Part III, of this Court, held in and for the County of Queens, at the County Courthouse, 88-11 Sutphin Blvd., Jamaica, New York, on the 6th day of March, 1950, and the issues having been tried before the Court without a jury on the 6th, 7th, 8th and 9th days of March, 1950, and the plaintiffs having appeared by Warner & Birdsall, Esqs. (Arthur G. Warner, Esq. and James E. Birdsall, Esq., of counsel), attorneys for the plaintiffs, and the defendant Joseph Simons, as President of Newspaper and Mail Deliverers' Union of New York and Vicinity, an unincorporated association consisting of more than seven members (hereinafter referred to as the "Union"), appearing by Samuel Duker, Esq., his attorney, and defendant News Syndicate Co., Inc. (hereinafter referred to as the "News"), appearing by Townley, Updike & Carter, Esqs. (J. Howard Carter, Esq. and John S. Bainbridge, Esq., of counsel), its attorneys, and all parties having presented their proofs and testimony having been duly heard by the Court; and none of the parties having submitted any requests nor having asked for an opportunity to submit any requests to find facts which such parties deemed established by the evidence; and due deliberation having been had; and the Court having duly

rendered and filed its decision in writing directing that judgment be settled in accordance with the aforesaid decision;

Now, on motion of Warner & Birdsall, attorneys for the plaintiffs, it is

ORDERED, ADJUDGED AND DECREED, that the plaintiffs have judgment against the defendants in the manner and to the extent hereinbelow more fully set forth; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant Union be and it hereby is permanently enjoined and restrained from interfering with the plaintiffs' employment by the defendant News by reason of plaintiffs' non-membership in the defendant Union; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant News and defendant Union be and they hereby are permanently enjoined and restrained from preventing the plaintiffs from enjoying the benefits to which they are entitled under the Agreement between the defendants, effective October 25, 1948 (hereinafter referrred to as the said Agreement), and from obtaining their rightful places in the shop seniority lists without regard to membership in the defendant Union; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant News and the defendant Union be and they hereby are enjoined and restrained from giving preference over these plaintiffs to members of the defendant Union, without regard to the principle of shop seniority, during the effective period of said Agreement and any subsequent agreement between the defendants which shall provide for shop seniority; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant News and defendant Union be and they hereby are permanently en-

joined and restrained from practicing any discrimination against the plaintiffs because of their nonmembership in the defendant Union; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant Union be and it hereby is directed to admit the plaintiffs to full membership in the defendant Union, except for just and legal cause, upon the plaintiffs' agreement to conform to the rules and regulations of the defendant Union and to pay the required initiation fees and dues to the defendant Union, or, in the alternative, the defendant Union and the defendant News be and they hereby are permanently enjoined and restrained from conducting their activities and relations with these plaintiffs upon the basis of a union shop; and it is further

ORDERED, ADJUDGED AND DECREED, that the execution of this judgment shall be stayed for a period of 30 days from the date hereof.

Enter,

FRANCIS G. HOOLEY,
J. S. C.

Appendix F

Opinion of Appellate Division.

SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT.

By Nolan, P.J.; Carswell, Adel, Sneed and Wenzel, JJ.

Ryan et al., res, v. Simons, &c., ap—In an action to restrain a labor union and an employer from discriminating against plaintiff employees because of their non-membership in the union and to direct defendant union either to admit plaintiffs to membership therein or to waive a union shop agreement with defendant employer, defendants appeal from a judgment in favor of the plaintiffs, entered after trial. Judgment reversed on the law, with costs, and the complaint dismissed on the law, with costs. The findings of fact are affirmed. Plaintiffs, employees of defendant News Syndicate Co., Inc., are not members of defendant union, and have been refused admission thereto, despite their conceded willingness to join and pay the required initiation fee and the customary dues. The union is a closed union and, in effect, admits only sons of members meeting certain requirements, within which class plaintiffs are not included. The theory of the complaint is that under such circumstances defendant union, the statutory exclusive bargaining representative of all the employees of the defendant employer, breached the common-law duty of agent to principal by entering into a contract with the employer providing for a union shop. It is clear, however, from the complaint, the prayer for relief and the testimony at the trial, that plaintiffs' basic grievance arises from discrimination against them, actual and threatened, in favor of union members. In our opinion, the controversy involves unfair labor practices within the purview of the Labor Management Rela-

tions Act, 1947 (U. S. Code, tit. 29, secs. 158 [a] [3] and 158 [b] [2]) and exclusive jurisdiction thereof is vested in the National Labor Relations Board (cf. Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d, 183; California Ass'n v. Building and Const. Tr. Council, 178 F., 2d, 175; U. S. Code tit. 29, sec. 160 [a]). The case of Clark v. Curtis (273 App. Div., 797, aff'd 297 N. Y., 1014) does not require a contrary holding. That case concerned the sufficiency of the complaint and was instituted prior to the passage of the Labor Management Relations Act, 1947. Unlike the case at bar, there was no showing that the employer was engaged in interstate commerce, and it does not appear that the question of the exclusive jurisdiction of the National Labor Relations Board, under the cited statute, was raised or could have been raised therein.

Appendix G

Amended Remittitur of Court of Appeals.

STATE OF NEW YORK,

IN COURT OF APPEALS.

AT a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-fourth day of May A. D. 1951.

Present: HON. JOHN T. LOUGHRAN,
Chief Judge, Presiding.

[SAME TITLE.]

A motion for a reargument of or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein, and

papers having been duly submitted thereon, and due deliberation thereupon had, it is

ORDERED, that the said motion for reargument be and the same is hereby denied. The remittitur is amended by adding thereto the following:

"Upon this appeal this Court held that, since there was no question as to the interstate nature of the defendant employer's activities and since plaintiffs' basic grievance arises from discrimination against them, actual and threatened, in favor of union members, the controversy involves unfair labor practices by a labor organization within the purview of the Labor Management Relations Act of 1947; that plaintiffs were required, in the first instance, to avail themselves of the administrative remedy set up by the statute and seek redress before the National Labor Relations Board; and that, accordingly, the courts of this state have no jurisdiction of the present controversy."

AND, the Supreme Court of the County of Queens is hereby requested to direct its clerk to return said remittitur to this court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

Appendix H

Final Judgment of Court of Appeals and Notice of Entry.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that a judgment of which the within is a copy was this day duly entered and filed in the office of the Clerk of the County of Queens.

Dated, N. Y., August 8, 1951.

Yours, etc.,

TOWNLEY, UPDIKE & CARTER,
Attorneys for Defendant
News Syndicate Co., Inc.,
220 East 42nd Street,
Borough of Manhattan,
New York 17, N. Y.

To:

WARNER & BIRDSALL, ESQS.,
165 West 46th Street,
New York 19, N. Y.,
Attorneys for Plaintiffs.

SAMUEL DUKER, Esq.,
11 West 42nd Street,
New York 18, N. Y.,
Attorney for Defendant Simons.

Judgment.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

[SAME TITLE.]

Plaintiffs having appealed to the Court of Appeals of the State of New York from the judgment of this Court entered in this action on the 2nd day of November, 1950 in the Office of the Clerk of the County of Queens, upon an order of the Appellate Division, Second Department, dated October 18, 1950, reversing a judgment in favor of the plaintiffs heretofore entered in this Court on the 12th day of May, 1950, and from each and every part of said judgment and order of reversal, as well as from the whole thereof; and said appeal having been duly argued at said Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudgd that said judgment so appealed from as aforesaid be affirmed and the complaint dismissed with costs, and having further ordered and adjudged that the proceedings herein be remitted to this Supreme Court, there to be proceeded upon according to law; and the remittitur from said Court of Appeals having been filed herein; and plaintiffs having moved in said Court of Appeals for a reargument, or in the alternative, to amend the remittitur and said motion for reargument having been denied and the remittitur amended by an order of the Court of Appeals dated May 24, 1951 and said remittitur having been refiled herein as amended; and an order dated July 31, 1951 having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now, on motion of Townley, Updike & Carter, Esqs., attorneys for defendant News Syndicate Co., Inc., it is hereby

ADJUDGED, that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

ADJUDGED, that the said judgment entered herein on the 2nd day of November, 1950, be and the same hereby is in all things affirmed on the law; and it is further

ADJUDGED, that defendant Joseph Simons, as President of Newspaper and Mail Deliverers' Union of New York and Vicinity, recover of plaintiffs, jointly and severally, the sum of $162.02, costs as taxed and that he have execution therefor against said plaintiffs or any one of them; and that the defendant News Syndicate Co., Inc., recover of plaintiffs, jointly and severally, the sum of $210.04, costs as taxed and that it have execution therefor against plaintiffs or any one of them.

The address of defendant Joseph Simons, as President of Newspaper and Mail Deliverers' Union of New York and Vicinity, is 63 Park Row, New York, New York and the address of defendant News Syndicate Co., Inc., is 220 East 42nd Street, Borough of Manhattan, New York 17, New York.

The addresses of said plaintiffs are as follows:

Thomas Ryan	140 West 238th St., N. Y., N. Y.
Louis Aiges	931 Troy Ave., Brooklyn, N. Y.
Leon Altheim	969 East 94th St., Bklyn., N. Y.
Hyman Bassin	2419 E. 27th St., Bklyn., N. Y.
David Berger	1861 50th St., Bklyn., N. Y.
Joseph W. Bianca	140 Wash. Walk., Bklyn, N. Y.
Edward F. Brennan	89-28 69th Rd., Forest Hills, L. I.
Salvatore Cirigliano	648 East 233rd St., Bronx, N. Y.

Carmelo Coscia	2267 1st Ave., New York, N. Y.
Abe Friedman	1925 Crotona Ave., Bronx, N. Y.
Emanuel Goldberg	716 East 5th St., New York, N. Y.
Louis S. Goldkranz	490 Kosciusko St., Bklyn., N. Y.
Abraham I. Gordon	5120 19th Street, Bklyn., N. Y.
Anthony Guerriero	17 Sterling Pl., Bklyn., N. Y.
Joseph Haugh	6807 7th Avenue, Bklyn., N. Y.
Walter Heller	708 West 177th St., New York, N. Y.
Louis Hochberg	100 Penn Street, Bklyn., N. Y.
John T. Holcomb	1552 E. 37th St., Bklyn, N. Y.
John Jones	450 West 51st St., New York, N. Y.
Peter A. Kelly	926 President St., Bklyn., N. Y.
Daniel Kenny	145 Seth Boyden Ter., Newark, N. J.
William Kleinman	299 E. Mt. Eden Ave., Bronx, N. Y.
Neil Knowles	111 East 3rd St., Bklyn., N. Y.
John R. McGuinness	2744 Fenton Avenue, Bronx, N. Y.
Louis H. Meyers	1091 Willmohr St., Bklyn., N. Y.
Frank P. Parella	460 East 181st St., Bronx, N. Y.
Rocco N. Parella	1177 73rd St., Bklyn., N. Y.
Alfred P. Petrassi	304 Adelphi St., Bklyn., N. Y.
Benjamin Ricotta	2021 West 10th St., Bklyn., N. Y.
Harvey Rose	2511 Newkirk Ave., Bklyn., N. Y.
Aaron Sacks	25-12 Steinway St., L. I. City, N. Y.
Henry Sadowitz	1016 East 13th St., Bklyn., N. Y.
Michael Scudero	4903 Avenue L, Bklyn., N. Y.
Jack Sender	1311 Seneca Avenue, Bronx, N. Y.
Irwin L. Siegel	2405 Avenue U, Bklyn., N. Y.
John W. Smith	720 52nd Street, Bklyn., N. Y.
Nicholas Stasi	102-28 88th Ave., Rich. Hill, L. I.

Arthur Sternberg	2263 84th St., Brooklyn, N. Y.
David Stupnick	488 Greenwood Ave., Trenton, N. J.
Manny Hirschbein	629 Avenue M, Brooklyn, N. Y.
Anthony F. Chiccoli	1967 West 4th St., Bklyn., N. Y.
Benjamin Gordon	274 East 175th St., Bronx, N. Y.
Donald Mallozzi	226 54th St., Bklyn, N. Y.
Jack Miller	788 Howard Avenue, Bklyn, N. Y.
Carl J. Ericsson	353 West 44th St., New York, N. Y.

PAUL LIVOTI,

Clerk.